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May 7, 2007

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554
Attn: CGB Room 3-B431

VIA EMAIL AND FIRST CLASS MAIL

RE: *Closed Captioning and Video Description of Video Programming – Implementation of Section 305 of the Telecommunications Act of 1996 – Video Programming Accessibility*

Ⓢ GB-CC-0270
CG Docket No. 06-181

Dear Ms. Dortch:

Enclosed for filing with the Federal Communications Commission are an original and two (2) copies of the Diocese of Gaylord's *Response to Opposition to Petition for Exemption from Closed Captioning Requirements Filed by Diocese of Gaylord*, an *Appearance and Proof of Service* in the above-referend matter. We also filed these documents electronically through the Commission's Electronic Court Filing System on May 7, 2007.

Very truly yours,

ROBERT T. WESTERMAN II, PLC

Robert T. Westerman II
RTW/gmp
Enclosure

cc: Paul O. Gagnier
Secretary, International Catholic Deaf Association – United States, Chapter 29
Veronica Balcarcel, Tonya Lenz, Carie Sarver
Candace Neff

Before the
Federal Communications Commission
Washington, D.C. 20554


In the Matter of)
)
CLOSED CAPTIONING *et al.*)
)
New Beginning Ministries)
)
Petitions for Exemption from Closed Captioning)
Of the Diocese of Gaylord)
)
CGB-CC-0270)
CG Docket No. 06-181)

APPEARANCE

To: Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
445 12th Street, SW
Washington, DC 20554

NOW COME the Diocese of Gaylord, by its attorney, ROBERT T. WESTERMAN II,
PLC, and enter his Appearance on behalf of the Diocese of Gaylord, pursuant to the statutes
made and provided.

Dated: May 7, 2007


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To: Darlene H. Dortch, Secretary
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445 12th Street, SW
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**RESPONSE TO OPPOSITION TO PETITION FOR
EXEMPTION FROM CLOSED CAPTIONING
REQUIREMENTS FILED BY DIOCESE OF GAYLORD**

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May 7, 2007

**RESPONSE TO OPPOSITION TO PETITION FOR EXEMPTION FROM CLOSED
CAPTIONING REQUIREMENTS FILED BY DIOCESE OF GAYLORD**

Petitioner, Diocese of Gaylord, requested an exemption from closed captioning rules on or about December 26, 2005, with regard to their one weekly Eucharistic Liturgy (Mass) recorded at St. Mary Cathedral in Gaylord, Michigan. The request was granted after careful consideration by Thomas E. Chandler, Chief Disability Rights Office, Consumer & Governmental Affairs Bureau. Opposition to the Petition for Exemption From Closed Captioning Requirements, filed by Diocese of Gaylord were submitted by various associations or entities supporting the deaf and hard of hearing on or about March 2, 2007.

The following is Petitioner's response to said Opposition:

I. Commission's Pertinent Rules and Statutes.

47 U.S.C. §613(e) and 47 C.F.R. §79.1(f) state that exemptions may be granted for a specific video program or video programming provider upon finding that the closed captioning requirements will result in an undue burden.

"The term 'undue burden' means significant difficulty or expense." 47 C.F.R. §79.1(f)(2).

Also, any video program or video programming provider shall be exempt whenever it is a locally produced and distributed non-news program with no repeat value. 47 C.F.R. §79.1(d)(8). In a recently issued Order granting exemptions from the closed captioning requirements under the undue burden standard, the consumer and Governmental Affairs Bureau noted that it is important to:

"Balance the need for closed captioned programming against the potential for hindering the production and distribution of programming".¹

¹ *In the Matter of Anglers for Christ Ministries, Inc., New Beginning Ministries, Video Programming Accessibility Petitions for Exemption from Closed Captioning Requirements, Case Nos. CGB-CC-0005 and CGB-CC-0007, Memorandum Opinion and Order, DA 06-1802, (CGB rel. Sept 11, 2006).*

The Bureau goes on to say that when considering an exemption petition filed by a non-profit organization that does not receive compensation from the airing of its program and, in the absence of an exemption, may terminate or substantially curtail the program:

"We will be inclined favorably to grant such a petition because . . . this confluence of factors strongly suggest that mandated closed captioning would pose an undue burden on such a petitioner."²

II. Diocesan Factual Background.

As set forth in the Diocese of Gaylord Request for Exemption from Closed Captioning Rules, as well as the Affidavit of Candace Neff, Director of Communications for Diocese of Gaylord (attached as Exhibit A), the Diocese of Gaylord began providing video tap of the weekly Eucharistic Liturgy (Mass) from St. Mary cathedral in Gaylord, Michigan, to WFQX (Fox 33), a small Fox network affiliate station located in Cadillac, Michigan, for broadcast on Sunday mornings to the ill and homebound of our diocese. The Diocese of Gaylord consists of the twenty-one most northern counties of Michigan (Lower Peninsula), which is primarily a rural area. As an ecclesiastical non-profit institution, the church must be relied upon to balance the many financial needs of serving various people within rural Northern Michigan, especially the poor, ill, disabled, elderly and homebound. Because there is no broadcast station located in Gaylord (the nearest station is more than sixty-five miles away), and the overall rural nature of the area, it is impossible to broadcast the weekly Eucharistic Liturgy live. However, the liturgical guidelines of the Roman Catholic Church provide that the participation in the Saturday vigil Eucharistic Liturgy does fulfill the same obligations and generally carries the same readings as the Sunday liturgy. Therefore, the Diocese of Gaylord contracted with WFQX Fox 33, a

² *Id.* At para 11 (citation omitted).

small Fox network affiliated located in Cadillac, Michigan (1½ - 2 hours from Gaylord via automobile) to broadcast the weekly Mass. WFQX's broadcast territory substantially corresponds to the territory of the Diocese of Gaylord. (See Candace Neff Affidavit Exhibits 1 and 2). The Bishop of the Diocese of Gaylord has approved the taping of the Saturday Mass for broadcast on Sunday morning and great care is taken to maintain the integrity of the liturgy (see Candace Neff Affidavit Exhibit 3).

As explained by Ms. Neff, none of the individuals involved in videotaping the liturgy have extensive training in camera operation, etc., but are learning "on the job". There are no professional engineers involved in the production process. Each week the regularly scheduled Saturday Evening Mass at St. Mary Cathedral (currently held at 5:00 p.m.) is videotaped by Candace Neff and/or an assistant utilizing parish volunteers as it is being celebrated live by the priest and congregation. The Program is then minimally edited to conform to the one hour time period allocated for broadcast. This is the only program the Diocese of Gaylord currently produces. The editing of the Mass utilizes the equipment installed at St. Mary Cathedral and is entirely produced on site.

The completed tape of the Mass is given to a courier at 9:00 p.m. on that same Saturday evening for transportation to the station in Cadillac. In order to be broadcast at 8:00 a.m. on Sunday morning, the tape must be delivered by midnight to the Cadillac station.

The Roman Catholic Liturgy is governed by the General Instructions of the Roman Missal and specific liturgical guidelines. Readings and prayers are appointed for each specific week and proclaimed live. Because each week is designated with particular readings and focus of the liturgy, there is no repeat value to the programming. Due to the time, geographic region, broadcast area and liturgical guidelines involved, it is a practical impossibility for the Diocese of

Gaylord to include closed captioning in its weekly Mass. Because the tape has no repeat value, the Mass must be televised the same weekend in order to correspond with the liturgical guidelines of the Roman Catholic Church. The priest's homilies, readings and many prayers are different each week. In the case of the homilist at St. Mary Cathedral on Saturday evenings, Fr. John McCracken, homilies are not written. (See Candace Neff Affidavit Exhibit 4). The Diocese of Gaylord has been searching for alternate means of providing closed captioning without success. (See Candace Neff Affidavit, Exhibit A). The Diocese of Gaylord has not been able to find any source within any reasonable geographic distance of Gaylord which has the time or ability to encode closed captioning on the tape between the hours of 9:00 p.m. on Saturday – 8:00 a.m. on Sunday morning.

The weekly televised Mass is not a news program and the Diocese of Gaylord receives no compensation for airing the Mass. The primary purpose for the broadcast of the Eucharistic Liturgy is to provide those Roman Catholics of our Diocese or others who are ill, disabled, elderly, homebound or otherwise separated from the Church, access to a local weekly liturgy.

Additionally, the program's budget is \$50,000.00. The cost to purchase encoding equipment and hire trained personnel to encode captioning on the tape and deliver it to the local station, even if somehow possible, would conservatively cost another fifty percent (50%) and be cost prohibitive. (See Candace Neff Affidavit, Exhibits 5 and 6).

Barring greater technological advances and price reductions in the area of encoding closed captioning by the diocesan church or non-profit consumer, an order compelling the Diocese of Gaylord to provide closed captioning in this case, for this solitary one-hour non-repeatable Eucharistic Liturgy will force cancellation of the Sunday Mass on WFQX Fox-33.

III. Argument.

While the Catholic Diocese of Gaylord certainly understands, appreciates and supports the factors contributing to the Commission's requirements of Closed Captioning for most programs, the Diocese's commitment to providing the televised Mass is also consistent with its faithfulness and mission to address the spiritual needs of a multitude of homebound, ill, disabled and elderly adults, as well as those suffering from hearing impairments.

Because the Mass is a non-repeatable program and there are substantial and logistical difficulties being faced by this rural Diocese in providing closed captioning for this televised Mass, the Diocese submits that those are exactly the type of difficulties which impose and define an undue burden upon this Petitioner as envisioned by the Statutes and C.F.R. 79.1(f)(2) of the Commission's rules. According to the Commission: "Undue burden shall be evaluated with regard to the individual outlet". (See attached Exhibit B). While other larger metropolitan Dioceses might have many different options at their disposal which would allow for closed captioning, the difficulties facing this diocese, do not. These situations are exactly the reason why the Commission has established exceptions to the general rule and are allowing exemptions to individual outlets when circumstances so warrant.

Aside from the logistical difficulties, even if somehow the Diocese were able to locate appropriate personnel and stations to accommodate the eleven-hour window between production and airing of the program, the financial consideration involved make the continuation of the televised Mass cost-prohibitive if the exemption is not granted.

In addition to the “no repeat value” nature of the taped Mass being a factor in the logistical difficulty and undue burden particularly facing the Diocese of Gaylord in this instance, Section 79.1(d)(8) of the Commission’s Rules allows an exemption, in and of itself, for “locally produced and distributed non-news programming with no repeat value”. It has been suggested by at least one opposition statement that Section 79.1(d)(8) is inapplicable allegedly due to the perceived limited definition of “video programming distributor” through the Rules. However, Section 79.1(d)(8) specifically states that “locally produced and distributed non-news programming with no repeat value” is exempt. Also, Section 79.1(a)(2) describes a video programming distributor as:

“Any other distributor of video programming for residential reception that delivers such programming directly to the home and is subject to the jurisdiction of the Commission. An entity contracting for program distribution over a video programming distributor. . . shall itself be treated as a video programming distributor for purposes of this section . . . to the extent such video programming is not otherwise exempt from captioning, the entity that contracts for its distributions shall be required to comply with the closed captioning requirements of this section.”

In the instant case, since the Diocese of Gaylord is locally producing and distributing, or contracting to distribute the video program, the exemption allowed under Section 79.1(d)(8) for “no repeat value” is wholly applicable. In fact, the Sunday Mass is precisely the type of locally produced, non-news programming that should qualify for this exemption. It is the only Catholic Mass produced and broadcast to the entire Northern Michigan television audience. Without it, thousands of ill, disabled, elderly and homebound individuals will not be able to partake in this Eucharistic Liturgy.

VI. Conclusion.

For the foregoing reasons, an exemption from the FCC's closed captioning requirements for this one weekly program, the Diocese of Gaylord's one-hour Sunday Mass at 8:00 am., is warranted and necessary in order to best serve the public interest.

ROBERT T. WESTERMAN II, PLC

By:



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Dated: May 7, 2007